

Effective remedy at the national court after breach of the European Human Rights Convention Article 6 (1) and (2)

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1 Introduction

1.1 Overview of the problem

In 2003, Norway lost four cases in the European Court of Human Rights (hereafter: "the European Court"). The function and mandate of the European Court is inter alia to hear and judge cases brought by individuals against the High Contracting Parties for breach of the Human Rights Convention's Articles and Protocols.¹ In two of the four cases in 2003 against Norway, the European Court found Norway in breach of Article 6² in *Walston v. Norway* and *Hammern v. Norway*. After the Court's finding of a violation of Article 6 (1) in the *Walston* case, the Court invoked Article 41 which resulted in the *Walstons* being awarded a partial reparation of 18 000 Euros.³ In the *Hammern* case, the Court held that there was a violation of Article 6 (2), but no monetary request was made and therefore compensation was not awarded.⁴ Both cases were brought back to the Norwegian National Court in an attempt to receive full reparations. The Appeals Selection Committee of the Supreme Court denied both requests.

This thesis will focus on the problem regarding full compensation of cases where the European Court has established a convention breach, using Article 41 and by doing so. I will in this connection examine European Court Article 41 (just satisfaction)⁵ and what flows from it; the invocation of what has become the Courts mantra: "*It would be*

¹ The European Human Rights Convention of 4 November 1950

² European Court Article 6, right to a fair trial

³ European Court judgement, *Walston v. Norway*, application No. 37372/97, para.67

⁴ European Court judgment, *Hammern v. Norway*, application No. 30287/97

⁵ The European Human Rights Convention, Article 41 ;" If the Court finds that there has been a violation of the Convention or the protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party"

*impossible to speculate as to what the outcome would have been in the domestic proceedings had the Article not been violated”.*⁶ By separating the breach from the case, the European Court effectively usurps the sovereignty of High Contracting parties and limits the aggrieved applicant from receiving full reparation in the National Courts. It is the National Courts privilege to be the last legal instance, however, in cases where the national law can only give partly reparation; the European Court can in these cases afford just satisfaction to the injured party.

Council of Europe Ministry Committee has made a recommendation to the High Contracting Parties to make their legislation conform so the aggrieved party could return to his former position. The Norwegian legislator has fulfilled this recommendation, their intention and will comes forwarded clearly in Norwegian Civil Procedure Act Article 407 No. 7.⁷

For one or another reason the intention and will of the legislators has not been fulfilled. Furthermore, right to an effective remedy is protected by Article 13 has been ignored. This thesis will show that the aggrieved parties that have suffered a loss because of the breach on the Convention have not been fully compensated.

⁶ European Court judgment of 3 June 2003, case 37372/97, para. 70

⁷ Norwegian text: The Civil Procedure Act, Article 407 No. 7; ”når en internasjonal domstol eller FNs menneskerettskomité i sak mot Norge har funnet at a) avgjørelsen er i strid med en folkerettslig regel som Norge er bundet av, og ny behandling må antas å burde føre til en annen avgjørelse, eller b) saksbehandlingen som ligger til grunn for avgjørelsen er i strid med en folkerettslig regel som Norge er bundet av, hvis det er grunn til å anta at saksbehandlingsfeilen kan ha virket bestemmende på avgjørelsens innhold, og gjeNopptakelse er nødvendig for å bøte på den skade som feilen har medført”

1.2 Intention and purpose of the thesis

Almost daily, through the news media, we hear about breaches on fundamental Human Rights, committed by countries we associate as guardians of these rights. This is surprising, seems like the like the western world has by taking these basic human rights for granted and in doing so at the same time have opened up for misuse of them.

Norway was one of the founding members to the Convention of Human Rights, where Rolf Ryssdal was the first Norwegian President. The country considered itself to be one of the best guardians of human right with only nine breeches in its entire history of the European Court, from the ratification of the Convention and until 2003. However, in 2003, Norway received four judgments against it. This was an unprecedented number of judgments in one year and represented an increase of over 40 %. This caught my interest; I wanted to find out what happen to the aggrieved parties cases after the Court established a Convention breach. This led to another question; was it the European Court or Norway that should give the aggrieved parties full reparation after a breach on the Conventions Articles and Protocols?

After 2003 there has been raised criticism against Norwegian Conventions breaches. In an article in Bergen's Tidende, Gro Hillestad Thune, lawyer, adviser and an earlier member of the former Human Rights commission in Strasbourg, stated that Norway's breeches on Human Rights occur daily. In the article she points out that Norway has an irritating double standard, she claims that the politician condemns other countries for breaches on Human Rights while there is little focus on the breaches committed in Norway.⁸

One of the questions that were asked was what can be done to increase the awareness for Human Rights in Norway? Ms. Thune pointed out the media's role in this and questioned

⁸ Bergens Tidende article published 13 April 2005

why it did not do a more critical journalism on this area. Furthermore, she pointed out that civil servants should be given the training they are entitled to.

This criticism on the lack of interest for breaches on Human Rights in Norway was also voiced by Marianne Haslev Skånland, a professor of linguistics at the University of Bergen. She stated in her article in the magazine; *Kommuner i Norge*; “Human Rights in Norway- as Low as they can go”, that the Norwegian citizen’s basic rights are being violated and the victims are left confused and unable to defend themselves. She stated her concern that the press does not have any interest in citizens that have been deprived of his or her rights and the Courts are not there for the ordinary people.⁹

The importance of Human Rights and their placement in Norwegians legislation, also addressed by Carsten Smith; former Chief Justice of the Supreme Court. He is of the opinion that Human Rights must be the main foundation for our state form. Mr. Smith has been an active advocate for incorporation of the Convention into the Norwegian Constitution. He states in his article in *Aftenposten* by arguing that the Convention should be placed in the Norwegian Constitution which “will mark that Norway is not only a constitutional government, but also a Human Rights state”.¹⁰

1.3 Method and limitation

To better the understanding of the problems stated in this thesis; full reparation at the national level after the European Court has established a breach of the European Human Rights Convention, I will in 1.4 give a brief historic background on the Convention and Norway’s ratification and incorporation of the Convention Articles and Protocols.

Turning to the European Court’s extensive use of Article 41 and what has become a mantra, “the Court cannot speculate what the outcome of the case would have been had all

⁹ *Kommuner I Norge* article, July issue 2004, of Marianne Haslev Skånland

¹⁰ *Aftenposten* article of 22 April 2006 by Chief Justice Carsten Smith

the fair hearing guarantees of this provision been respected in those hearing ”¹¹ and thus limiting access to have the case fully repaired by the National Courts.

Methodically, I will use the two Norwegian cases where the European Court found breaches of the European Human Rights Convention. In order to prove my points in this thesis, that it is the privilege of the National courts to judge as the last instance in a case. In this I will examine the Norwegian Civil Procedure Act Article 407 No. 7 which set up the conditions for reopening a case before the national courts and European Court Article 13 regarding the right to an effective remedy. Furthermore, I will examine the reasons the Appeals Selection Committee of the Supreme Court gave for dismissal of the request for reopening case No. HR-2004-01931; parties in the case were Møyfrid and Michael Walston v. DnB NOR ASA and dismissal judgment in a reimbursement case No.2005-00898; parties in the case was Ulf Hammern v. the Ministry of Justice.

The thesis will be conducted from the hypothesis that the individual that have suffered a loss because of a Human Rights violation, have little change to get full compensation for the damages the breach caused, because of the European Court mantra invoked with in Article 41. This is a problem for the state. Firstly, it raises questions regarding the states sovereignty; secondly individuals are not receiving the protection guarantee to them under the European Human Rights Convention.

By the European Court wide use of Article 41 followed by the mantra “It would be impossible to speculate as to the outcome of the domestic proceedings had the article Not been violated “, can open up for the High Contracting parties to willingly give up their National sovereignty by letting the European Court award the aggrieved party a small amount of money, or the so-called enrichment of the European Court case law by saying the finding of a breach is in itself just satisfaction. The High Contracting parties willingly

¹¹ European Court judgment in Walston v. Norway, case 37372/97, para. 70

give up their sovereignty for so-called court economy. It might be much cheaper to let the European Court award small money than it is to retry cases or pay out reparations.

It's against this background that this thesis is going to assess the effectiveness of Article 41 and the consequences of the European Court practice of not linking the breach to the consequences of the breach and the High Contracting parties following the court's lead in not connecting the breach with the case in which the breach was judged.

In my thesis I will use national and international Laws and others relevant materials listed below.

National laws

- The Civil Procedure Code of 13 August 1915 No.6
- The Execution and Enforcement Code of 26 June 1992 No 86
- The Penal Code of 22 May 1902 No.10
- The Code of Criminal Procedure of 22 May 1981 No. 25

International Conventions

- United Nations Universal Declaration of Human Rights of 10 December 1948.
- The European Human Rights Convention Articles and Protocols of 4 November 1950

Case law

- National and European Court cases

Juridical literature

Demarcation

There is not much written about European Court Article 41, the reasons for that can be many. I chose to focus on the Walstons case with reference to the Hammern case, because

both cases represent the core of the problem; how to get a case fully repaired after a breach on the Convention Articles and Protocols were found. In order to prove the point as to how the European Court effectively usurps the sovereignty of High Contracting parties and limits the aggrieved applicant from receiving full reparation in the National Courts, I will do an in depth analysis of the Walston case, from the District Court to the European Court judgment of 3 June 2003 with reference to Hammern case.

1.4 Historic background for the European Court and Norway's incorporation of the Convention

International Law enacted to secure and protect fundamental Human Rights, has in recent years played an increasingly larger role in the national legal systems. It is an accepted Norm that States are sovereign within their jurisdiction. The States have their own legal system that applies equally to everyone, regardless of citizenship. However, it is also internationally accepted that there are certain inviolable rights and freedoms that cannot be abridged by the State and therefore need extra protection. Fair hearing and equal treatment, right to life, right to property, right to privacy, are paramount among these rights. The need for an external control for these rights became apparent after the horrors committed during the Second World War which laid the ground for universal and regional Human Rights organizations whose task was to prevent the violation of these rights.

The victorious allied powers, in forming the United Nations Charter 10 December 1948,¹² was a giant step forward to protect these fundamental Human Rights. In the Charter's preamble it was emphasized the Member States have to promote and respect for and preserve Human Rights and fundamental freedoms.¹³

Europe, being devastated by the war, followed up with establishing the Statutes of the Council of Europe 5 May 1949. The Council of Europe, a regional intergovernmental organization seized the moment and founded the European Convention for the protection of

¹² United Nations Universal Declaration of Human Rights of 10 December 1948

¹³ Preamble to United Nations Universal Declaration of Human Rights of 10 December 1948

Human Rights. The convention was signed 4 November 1950¹⁴ and came into force 3 September 1953. Another moment the Council of Europe was preoccupied with was the need to protect democracy from Communist subversion.¹⁵

Furthermore, the aim of the Council of Europe was to pursue “a greater unity between its members” in which the maintenance and further realization of Human Rights and fundamental freedoms. The preamble to the European Human Convention rights, mentions specifically the importance of having a political democracy where fundamental freedoms are the foundation of justice and peace in the world. At the end of the preamble it refers to what binds European together, they are “like-minded and have a common heritage of political traditions, ideals, freedom and the rule of law”.¹⁶

1.4.1 Individual rights

What separates the European system from the United Nations model is the sanction authority vested in the Court. The European Human Rights Court was established in 1959 by the Council of Europe.

Primarily, international law regulates the relationships between states as such.¹⁷ However, the European states concern for the individual and organizations made it possible for the individual to complain to the European Human Rights Court in Strasbourg.

It is an accepted Norm among prominent legal scholars: “To permit such a right of individual petition was in many ways revolutionary, given the strength of Notions of Independent sovereignty of the state at the time of the creation of the Convention system”.¹⁸

¹⁴ Council of Europe, European treaty Series, No 5, 4 November 1950

¹⁵ Jacobs & White, The European Convention on Human Rights, page 2

¹⁶ Preamble to The Convention for the Protection of Human Rights and Freedoms as amended by Protocol No. 11

¹⁷ Dr. Professor Carl august Fleischer- Folkerett, page 17:” Dette rettsystemet har som sitt vesentlige øyemed å regulere forholdet mellom de ulike folk, eller nærmere bestemt forholdet mellom statene som sådanne”

Thus, an individual, who claims that his Convention Rights have been violated, can take his claim to the European Court. When the European Court establishes that there has been a violation of the Convention or the Protocols and the National Court allows only partial reparations or none at all, the Court can invoke Article 41 and award compensation in the form of pecuniary and non pecuniary damages, cost and expenses to the injured party.¹⁹

Norway was one of the 10 founding members²⁰ of the Council of Europe in 1949 and a High Contracting party to the convention since 1951. Today the European Convention has 46 High Contracting Parties with over 800 million inhabitants as of 2005.²¹

The Convention was ratified by the Norwegian Parliament November 1953. But it took another 46 years before the Convention was incorporated into law, 21 May 1999.²² The High Contracting parties are not obligated to incorporate the Convention, but it is seen as loyalty to the Convention to do so. Norway chose to incorporate the Convention in law form, with reference to the Convention rights laid down in the Constitution. With the new Human right Act (Menneskerettsloven) the Convention was given priority over ordinary law and thus becoming what many legal scholars call “a somewhat semi-constitutional right “.²³

Before the incorporation of the Convention into National law, the Convention provisions were an important and a weighty interpretation source for the National Courts. It was presumed that Norwegian laws were in conformity with the countries international obligations.²⁴ Several laws, including the Penal Code, The Criminal Proceedings Code and

¹⁸ Philip Leach – Taking a case to the Court, Second Edition. Page 6, second chapter

¹⁹ European Court Article 41, just satisfaction

²⁰ Belgium, Denmark, Frankrike, Tyskland, Irland, Italia, Luxemburg, Nederland, Norge, og det Forente kongerike (Storbritannia og Nord Irland)

²¹ www.echr.coe.int

²² Norges lover, European Human Rights Convention, incorporated 21 May 1999

²³ Said by the Former Chief Justice of The Supreme Court Carsten Smith, in his memorial speech for Torkel Opsahl in Oslo 13 October 1998

²⁴ RT.1994-1244, page 1250

the Civil Procedure Act have a paragraph stating that the various laws should be interpreted inn the light of Norway's obligations under the international law.

2 The High Contracting party's sovereignty

Considering that the States are sovereign and can decide freely within their territory, they are only obligated by the treaties they enter and by custom.²⁵ According to Black's Law Dictionary sovereignty of a state is "characteristic of or endowed with supreme authority". Sovereign equality in international law is defined as a principal "that the Nations have the rights to enjoy territorial integrity and political independence, free from intervention by other Nations".²⁶ This means that states have their own legal system and the convention becomes subsidiary to it. However, the High Contracting parties have entered a binding agreement to guarantee within their jurisdiction to respect and secure the rights enumerated in the Convention according to Article 1.²⁷

This gives the National authority both negative and positive obligations. Negative obligations of the Convention prevent the state from implementing laws and rules that will breach the Convention and positive obligations in the form of laws to protect the individual. The positive principal was recently established in the Von Hannover v. Germany.²⁸ In the Von Hannover case the applicants did not complain of an action by the State, but rather of the lack of adequate State protection of her private life and her image.

²⁵ Erik Møse- Human Rights, 2002

²⁶ Blacks Law Dictionary- Eight edition

²⁷ European Court Article 1 (obligation to respect Human Rights)

²⁸ European Court judgment: Hannover v Germany, case No. 59320/00

2.1 Usurping the High Contracting Party's sovereignty

The High Contracting parties have pledged to abide by the European Court's final judgments. This principal is laid down in Article 46 of the Convention. It is, however, the High contracting party's privilege to choose how they will comply with a judgment where the European Court has found a breach of the Convention, whether they retry the case or pay compensation. This because of the High Contracting Parties Sovereignty principal. The principal has been established by the European Court, in among others, case *Marckx v. Belgium* from 1979, where the Court stated as following: "*The court's judgment is essentially declaratory and leaves to the State the choice of the means to be utilized in its domestic legal system for performance of its obligation under Article 53*".²⁹

There is one important exception to Article 46; the European Court can award compensation for Non-pecuniary, pecuniary and cost and expenses in cases where the national law does not allow or partly allows reparation by invoking Article 41.

Article 41 states:" *If the Court finds that there has been a violation of the Convention or the protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.*

The effect of the European Court judgment is to have the injured party put back, if possible, to the same position as he was in before the breach occurred.³⁰ There is No explicit duty for the High Contracting parties to reopen cases where European Court has established a Convention breach.

²⁹ European Court judgement, Series A, No 31, 13.06.79, 81970-1980

³⁰ Philip Leach- Taking a case to the Court, Second Edition, Appendix 19, page 94, para.4.5.1

However, the Committee of Ministers, under Article 15 b of the Statue of the Council of Europe, made a recommendation in the year 2000 to the High Contracting Parties on the re-examination or re-opening of certain cases at domestic level.³¹

The Norwegian legislators have followed the Ministers recommendations in NOU 2001:32 volumes A, Chapter 15, where the Civil Act Committee discusses inter alias this topic.³² In changing the Civil Procedure Act 407 letter b was a new addendum, tying it to procedural errors which could have had an effect on the outcome of the case.

For criminal cases treated by the National Court(in Ot.prp.No. 70), the legislators decided to have reopening of these cases laid to a separate organ "Reopening for criminal cases".³³ This is basically the same model as UK has adopted.³⁴ The goal is to give the accused better legal protection.

2.1.1 The State's obligation

In the Walston and Hammeren cases the State had a positive obligation to repair the damage that the breach of Article 6 caused. Article 41 coupled with the mantra, became however a hindrance to have the these cases repaired. The Walstons did receive partial reparation for non pecuniary damages by the Court using Article 41.Hammern did not receive any compensation because he did not request it. Norway's breaches of Article 6 were established by the Court, but neither the Walstons or Hammern has received *restitutio in integrum*.

³¹ Philip Leach- Taking a case to the Court, Second Edition, Appendix 19, page 612-613

³² NOU, Norwegian Public review 2001: 32 volume A, chapter 15 from 435 - 453

³³ Norwegian text: "Kommisjon for gjennopptagelse av straffesaker", established 1 January 2004

³⁴ Should access to reopening be wider? (Ot. Prp.No. 70, 5.2)

An autonomous interpretation of Article 41 applies only when the National law allows only partial or no reparations at all. In these cases Article 41 is of utmost importance. The Court can award financial compensation for Non-pecuniary loss, pecuniary loss and costs and expenses to the aggrieved parties.

The problem arises when the European Court awards compensation according to Article 41 but invokes the mantra that it sees no causal connection between the breach and the case. This prevents the Applicants from having their incorrect judgment fully repaired in the National Court, preventing *restitutio in integrum*. The European Court becomes a defacto fourth instance and usurps the sovereignty of the High Contracting parties, in this case Norway. This defacto surrender of National sovereignty has the effect of saving the expense of compensation payments or the expense of conducting a new trial.

2.2 Criticism of the European Court use of Article 41

The European Court has been criticized for their use of Article 41, because the Court has become a defacto, fourth instance. In the *Kinsley v United Kingdom* case, Liberty,³⁵ a Non-governmental organization, intervened and criticized the European Court for using what has become a mantra “It would be impossible to speculate as to what the outcome would have been in the domestic proceedings had the Article Not been violated”.³⁶ This mantra in itself is a speculation.

In case *Kingsley v United Kingdom* the court ruled against awarding just satisfaction for Non-pecuniary damage sustained by the applicant. In the dissenting opinion of Judge Casadevall joined by Judge Bonello and Kovler, it was stressed that the principle constantly reiterated by the Court, that the convention is a living instrument which must be

³⁵ European Court judgment, case No. 35605/97 - *Kinsley v. United Kingdom*, page 10 para. 39

³⁶ Philip Leach - *Taking a case to the Court*, Second Edition. Page 60, under comment on the *Kinsley v. UK*, case No. 35605/97

interpreted in the light of present-day conditions that its intention is to guarantee rights that are Not theoretical or illusory, but practical and effective, and in accordance with “...*the principle that the applicants should be as far as possible be put in the position he would have been in had the requirements of the convention not been disregarded*”.³⁷

In the view of the three dissenting Judges, *Article 41, a mere finding of a violation cannot constitute in itself adequate just satisfaction*. Applicants are entitled to something more than a mere moral victory or the satisfaction of having contributed to enriching the Court’s case-law.³⁸ Where the Court concludes that there has been a violation of one of the provisions of the Convention, and mindful that the domestic law affords only partial redress or none at all for the consequences of the violation, an award of just satisfaction in compensation for Non-pecuniary damage ought to be the *rule*. A decision that the finding of a violation constitutes in itself just satisfaction ought to be the exception and reserved for cases with minor consequences such as some breaches of procedural rules of a kind known as technicalities, or cases which have not *significantly affected* an applicant’s situation. With regard to breaches of procedural guarantees, the almost invariable practice of the Court is to refuse to award compensation for pecuniary damage on the ground that the court cannot speculate as to the outcome of the domestic proceedings had they complied with the convention. *However where a violation has been found it is that violation itself which-beyond any possibility, pecuniary damage-causes the applicant Non-pecuniary damage, irrespective of the outcome of the proceedings.*

³⁷ European Court judgment, case No. 35605/97 - Kinsley v. United Kingdom, page 10 para. 39

³⁸ European Court judgement, Kingsley v. United Kingdom, case No. 35605/97, para. 2 and 3 under the partly dissenting opinion of Judge Casavalle, Judge Bonello and Judge Kovler

2.3 The Human Rights Convention, Article 6

Interpreting Article 41 autonomous after the European Court found Norway in breach of Article 6, both cases, Walstons and Hammern, should be brought back to Norway to either be retried or compensated. Both cases contained breaches on fundamentally legal principal such as breach on the principal of adversial hearings and equally principal, and right to compensation after being acquitted.

To get a better understanding of Article 6 and to under build my thesis I will give a brief explanation of the Article and its application.

Article 6 is one of the most commonly breached Articles in the Convention.³⁹ The Article is extensive and particular and is the most fundamental and universal provision of the Convention. The late Walther Ganshof van der Meersch, a Belgian Judge in the European Court, once said that Article 6 “would make a marvelous compendium of procedural law”.⁴⁰ The Article covers both civil and criminal cases. The first part of article 6 applies to both of the cases while the last part of Article 6 applies mainly to criminal cases. In addition to the written guarantees, Article 6, through practice, contains several protections of fundamental rights such as: access to court, equality of arms and the contradictory principal.

The Convention Article 6 (1) and (2), original text:

1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the

⁴⁰ Council of Europe collection; Science and technique of democracy, No 28, the right to a fair trial 2000, page 10

private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

Under the principle of equality of arms, as one of the features of the wider concept of fair trial, each party must be afforded a reasonable opportunity to present his case under conditions that do not place him at a disadvantage vis-à-vis his opponent as in European Court *Dombo Beheer B.V. v the Netherlands*.⁴¹ In this context, importance is attached to appearances as well as to increased sensitivity to the fair administration of justice as in *Bulut v. Austria*.⁴² Under the principle of adversarial hearings, there is an absolute right to have access to and oppose the evidence against you.

2.3.1 Breach on European Court Article 6 in the Walston case

In the Walston case Article 6 § 1 was breached. The Walstons were denied by the Gulating High Court, access to their case documents before the Court made their judgment in a foreclosure case and by doing so prevented the Walstons from opposing the DnB NOR ASA communication put forward to influence the High Court.⁴³ The European Court found that it was for the Walstons to judge whether or not a document would be commented upon; by denying them this right, the Court found that they were placed at a disadvantage vis-a-vis the Bank in the High Court proceedings.⁴⁴

⁴¹ *Dombo Beheer B.V the Netherlands*; European Court Judgment of 29 October 1993, Series A No. 274, p.19, § 33

⁴² Judgment of 22 February 1996; reprints of Judgements and decision 1996-II, p. 356, § 47

⁴³ Gulating High Court judgment of 3 December 1996, case No. 96-01419

⁴⁴ European Court judgment in *Walston v. Norway*, application No. 37372/97, p 58

2.3.2 Breach on European Court Article 6 in the Hammern case.

One of the pillars of a fair trial is the presumption of innocence. The accused is innocent until proven guilty. Hammern was finally acquitted in the Frostating High Court ⁴⁵ 30 January 1994. However in the request for compensation, the old Code of Criminal Procedure Article 444 placed the burden of proof of innocence on the accused in question to prove that there was over 50 % probability that he did not do the criminal act. At the time Hammern case was treated in the High Court the old Article 444 was in force and because of the requirement of proof in compensation cases, Hammern was denied full compensation ⁴⁶. The law was amended in 2003⁴⁷ to include the abolition of the requirement that the accused must prove his innocence.

⁴⁵ Frosting lagmannsrett judgment of 31 January 1994

⁴⁶ Frostating High Court judgment of 31 JANUARY 1994, Hammern v. Ministry of Justice

⁴⁷ On 15 May 2002 this bill was presented to Parliament (Ot.prp.77, 2001-2002), changed with law No.30/2003 in force 1 January 2004

3 The Walston case

3.1 Introduction

In the Walston case,⁴⁸ the European Court use of Article 41 manifests itself. The European Court, after finding a breach of Article 6, invoked Article 41 and awarded compensating of 18000 Euros for non- pecuniary damage. The claim for pecuniary damage was dismissed with the mantra “It (the court) cannot speculate on what the outcome would have been had all the fair hearing guarantees of this provision been respected in those proceedings”. The Court’s use of their mantra prevented the Walstons to receiving an effective remedy under Article 13 at the National Court, be it a new trial or a monetary settlement. In order for the European Court to arrive at such a conclusion, the Court would have to judge the case in its entirety. This would be far beyond the it’s mandate, making it a 4th instance by so doing usurps Norway’s National sovereignty. The High Contracting parties, all 46, have allowed this defacto usurpation. In order to prove these points I will make indebt analyses of the Walstons case complex.

3.1.1 Background in the Walston case

The Walstons lost their home and investment property in Stryn and Vågsøy without the material part of the Walston v DnB case having been treated; namely if the Walstons were in default, how much and from when was the alleged default.

A contract was made 7 November 1989, between three parties, DnB NOR ASA, State district development bank known as SND and Møyfrid and Michael Walston to secure a first mortgage on the hotel property in Stryn. The loan was to be secured by a lien of NOK

⁴⁸ Walston v. Norway, European Court case No. 37372/97, p.70

2.3 million. The SND was to pay the Bank 800,000 NOK this amount was loaned to the Walstons by the SND. The bank was to write off everything over this amount. The Walstons were to pay a quarterly payment of 89,000 Kr. This was the three party contract. Eight months after the agreement came into force the Walstons discover that DnB NOR ASA had not complied with the agreement. The Bank kept a NOK 500.000,00 side security loan that served to secure the building loan under the restoration; on a property in Vågsøy. The bank did not write down the building loan to NOK 2.3 million as they contracted to do. The restoration was complete, the inventory was in place and the Walstons had completed their first season in business when they discovered that the bank had reneged on the contract of 7 November 1989. The problem was taken up with the Bank they responded by calling in the loan the day before Christmas 23 December 1990.

The Walston filed a suit against DnB NOR ASA for breached of contract. The suit was submitted to the court 16.02.1992, but was not accepted by the court before 23.04.1992. The case was a clear breach of contract by DnB NOR ASA, admitted in their confession letter of 3 December 1990.⁴⁹

Nordfjord District Court rendered 22 April 1994⁵⁰ the following Judgment:

Main case:

1. The claim for payment against The Norwegian bank is dismissed.

Countersuit:

1. Lien from Møyfrid and Michael Walston, NOK 2 300.000,00 registered 10.07.1986 attached to the property under land number 45, title 108 in Stryn, is binding on Møyfrid and Michael Walston and can be used as a basis for enforcement of a debt.

2. Lien from Møyfrid and Michael Walston, NOK 500.000,00 registered 10.07.1986 attached to the property under land number 113, title number 91 & 91 in Vågsøy, is binding on Møyfrid and Michael Walston and can be used as a basis for enforcement of a debt.

⁴⁹ Letter from DnB of 3.12.1990:” Vi erkjenner likevel at kravet om avlysning kan forsvares i og med at banken har akseptert avskrivning av beløpet”

⁵⁰ Nordfjord District judgment of 22 April 2004, case No. 92-00144A

Before the judgment of 22.04.1994 became final, DnB requested foreclosure on the property in Stryn using the declaratory judgment and bought the property for NOK 1 550 000, 00 which was far below the appraised value of NOK 6 200 000, 00. The question whether the Walstons were in default was not treated in the judgment.⁵¹

DnB NOR ASA with the Courts approval sold the Walston properties four times without treating the central issue of whether the Walstons were in default, or the bank was in default.

This was the status of the case when the High Court made its decision to allow the foreclosure on the property in Vågsøy while denying the Walstons the right to oppose the 9 October letter.

3.1.2 The Nordfjord District Court judgment of 25 June 1996

After the foreclosure sale in Stryn, the Bank petitioned the court to foreclose on the property in Vågsøy. The lien on the property was a side security lien, given as a security if the restoration was not completed and was to be taken away⁵² with conversion of the buildings loan to permanent financing. The bank said it was a loan with interest, providing No documentation to support this claim.

The Nordfjord District Court made the following judgment in the DnB request for foreclosure on property in Vågsøy. Judgment was rendered 25.June 1996⁵³ with following ruling:

1. Request regarding circuit court Judge shall reque himself because of incompetence in case No. 95-00287 c will not be allowed.

⁵¹ Gulating lagmannsrett judgment of case No. 96-01133

⁵² Nordfjord District Court judgment of 24 April 1994, case No 92-00144A. Page 10, third chapter

⁵³ Nordfjord District Court judgment of 25 June 1996, case No. 95-00287

2. Request for foreclosure over land number 113 and title number 91 and 92 in Vågsøy municipality will be allowed.
3. The foreclosure will be done as a foreclosure sale with assistance according to Civil code Article 11-12
4. The decision regarding the foreclosure sale will be registered on the property, land number 113 title numbers 91 and 92 in Vågsøy municipality

The Judge found it practical first to treat the competence objection raised against him. After a lengthy discussing of his own competence question, the Judge conclude ⁵⁴ that he was competent and free of bias to treat the case. For the material part in the case the Judge referred to his own declaratory judgment of 22.04.1994, case No. 92-00144 A.⁵⁵

By letting a declaratory judgment stand, without treating the questions whether the Walstons had been in default or not gives reason to believe that the procedural errors in the case started here. The District Court Judge used the declaratory judgment as if it was a judgment of performance in his judgment where he permits foreclosure on the Vågsøy property. The Judges statement that “the objection Møyfrid and Michael Walston have raised against the foreclosure sale is now legally binding and can be used for the request for foreclosure, strengthens this assumption.

For the judge to use his own declaratory judgment of 22.04.1994 to confirm a request to hold foreclosure on the property in Vågsøy is wrong for two reasons:

- The declaratory judgment of 22.04.1994 stated only the party’s position in the case.
- The declaratory judgment of 22.04.1994 did not provide for or order enforcement and therefore did not take a stand on whether the Walston were in

⁵⁴ Nor fjord District Court judgment of 25 June 1996, case No. 95-00287. “The request for the undersign Judge shall vacate the seat as being incompetent, will Not be permitted”

⁵⁵ Nordfjord District court judgement of 22.04.1994, case No. 92-00144 A

default of the contract of December 1990 or the bank. This contract pledged for security the property in Stryn and Vågsøy.

The parties in the case and according to The Civil Procedure Act of 1915 § 86⁵⁶, are responsible for which proof they want to present to the Court. But, those who apply the laws have a controlling duty to see that the foreclosure request satisfies the conditions set down by the law.⁵⁷ In the present case the presiding Judge had a controlling duty to see to it that the enforcement law was fulfilled when he granted the banks foreclosure request. This was not done by the presiding Judge.

According to the Enforcement act § 4-4⁵⁸ default must have accrued before a request to hold a foreclosure can be granted. This is part of the Judge's controlling duties to see that the law has been fulfilled to allow a foreclosure sale. In cases where objections against the foreclosure sale have been raised, as in the Walston case, the court shall point out who should take out a lawsuit.⁵⁹ The Judge committed a procedural error by not controlling that the laws set forward in the Enforcement Act were fulfilled. It is current law that default must be present for granting a foreclosure sale. Thor Falkanger.⁶⁰

⁵⁶ The Civil Procedure Act of 1915 § 86 – Norwegian text: "Det paahviler parterne at gjøre rede for de faktiske forhold og bevis, som er av betydning for avgjørelsen"

⁵⁷ The Civil Procedure Act of 1915 § 87. Norwegian text: "Under sakens gang bør retten gi baade parterne og andre den veiledning, som kræves for at forebygge eller rette feil og forsømmelser i rettergangen. Navnlig bør den gi opplysning om adgangen til at angripe dens avgjørelser".

⁵⁸ Enforcement Act § 4-4. Foreclosure of a claim cannot be requested before the claim is overdue and default has accrued.

⁵⁹ Enforcement Act § 6-6. If the defended raise objection before it is decided that the execution shall be done, the court decide who of the parties shall raise the lawsuit

⁶⁰ Tore Falkanger compendium over enforment (Second edition 2000)

3.1.3 Gulating High Court judgment of 3 December 1996

The case in its entirety was appealed in due time to the Gulating High Court.

However, the High Court states in their judgment of 3 December 1996⁶¹ that the case is regarding only the competence questions to the Judge because of his earlier employment with the bank.⁶² But in their rendered judgment,⁶³ the High Court confirmed the Nordfjord Circuit Court judgment of 25 June 1996 in its entirety including the request granted for foreclosure sale and has the foreclosure sale registered in the public registrar. Here the procedural errors that accrued in Nordfjord District Court are continued, which leaving the material part of case untreated.

The High Court does not correct the procedural errors regarding the lack of treatment of the question if the Walstons were in default or not. First the High Court treats the Nordfjord District Court Judges Competence issue and comes to the conclusion that his earlier employment with the Walstons opponent, DnB, was not a reason for declaring the Judge incompetent. First on page 7, chapter 5 the material parties mentioned briefly as following:” the Walston attack on part of the District Court judgment regarding the request for foreclosure, conclusion point 2, 3 and 4 are not further reasoned. Therefore, The High Court gives no further in its treatment on this important issue.” Since the District Court did not treat this issue, the High Court does not treat the procedural issue regarding the courts duty to see that the requirements to grant a foreclosure sale are satisfied. In other words, the High Court continues the procedural error done by the Nordfjord District Court.

⁶¹ Gulating High Court judgment of 3 December 1996, case No. 96-01419

⁶² Gulating lagmannsrett judgment of 3 December , case No. 96-01419, page 1 : “ The case concern legal competence”

⁶³ Gulating High Court judgment of 3 December 1996, case No. 96-01419,page 8:” 1. The Nordfjord Court judgment of 25 June 1995 is confirmed”

Furthermore, what makes this case so grave is the High Court judgment is done before the Walstons request to see the documents in the case are granted and thus preventing the Walstons from opposing the points 2, 3 and 4 in judgment of 25 June 1996. The Banks pleading refer to only as the lien without identifying what lean? The Walstons had in their pleading of 23 September 1996⁶⁴ requesting the bank to document the banks alleged claim of NOK 6 000 000, 00 set forward in the banks writ of 10 September 1996.⁶⁵ The pleading of 10.09.1996 and 23.09.1996 shows that there were discussions going on between the parties regarding the alleged debt the bank claimed they had against the Walstons. By not communicating a copy of the banks pleading to the Walston, the court effectively prevented the Walstons to have the banks allegation of the Walstons alleged default legally treated. The court cut off the case, thus preventing the material part of the case from being treated.

Taking into Consideration that the Walstons twice requested the High Court to provide a copy of the case documents⁶⁶ before the court made its judgment, it is a mystery why the court did not honor their request. The Walstons received the case document after the High Court judgment was rendered, in which the banks writ of 9 October 1996 became known to them.

The Walstons claimed that the banks pleading of 9 October 1996 was submitted to influence the court which was supported by Professor Dr. jurist Carl August Fleicher in his legal opinion of 6 January 1997.

The banks reply of 9 October 1996, which Gulating High Court saw No reason to send the Walstons contained crucial information.

⁶⁴ DnB letter of 9 October 1996, presented to the Supreme Court in case LNo. 45K/1997, JFR. 287/1997 as Document No. 15. The letter stated:” The appellant have a debt to The Norwegian Bank ASA over NOK 6 000 000, 00.”

⁶⁵ Pleading to Nordfjord District Court, case No. 95-0287, Document No. 17:” a). what secured lien does DnB have in Stryn? b) What is the extent of the claim towards the family Walston?

⁶⁶ Pleading to Nordfjord District Court , case No. 95-0287, Dokument No. 19

- Firstly the bank admitted that the circuit court judge was aware that the Walstons had No trust in him since 1992. This contradicts the District Court Judges own statement in his judgment of 20 December 1995 ⁶⁷ on the Walstons lack of trust in him Judge Steintveit said “I have up to Council Fjeld pleading of 12.12.1995 understood it such that Møyfrid and Michael Walston also have been of the same opinion”. That is that the Judge thought the Walstons had trust in him.
- Secondly, the bank did not forward documentation for the alleged debt, the bank did not identify the debt and any default from the Walstons, from what time the default occurred, how much etc. The banks statement “regarding the debt size, this was treated in the main case”, was for the Walstons new information.

In sum, this shows that the Judges Competence question was not fully treated. The material part was Not treated by the High Courts The action of Not communicating the banks pleading of 9 October 1996 effectively denied the Walstons the right to the adversarial hearing principle and equality of arms, breach of Article 6 § 1. In addition to the rights adversarial hearing, the Banks letter submitted to influence the court; there were several good reasons for the Walstons to oppose the banks pleading beyond upholding the rights that is enshrined in Article 6 of the Convention.

It is of interest to mention the courts attempt to treat both; the Walstons had written proof that the bank admitted that they where in default of the contract of 7. November 1989. This was stated again after all appeals were exhausted in the Courts. The Banks council admits in the letter of 13 June 2001, as follows: “Incidentally, it is correct that the claim size and the claim for access into accounts have not been subjected to adjudication.” ⁶⁸

⁶⁷ Nordfjord District judgment of 20 December 1995, case No. 95-00301, page 6, 4 chapters

⁶⁸ Addendum No. 1 in pleading of 24 February 2004, case No. 03-010321, Dok. No. 15, to Oslo Court. Letter stated (Norwegian text): “For øvrig medfører det riktighet at kravets størrelse, og krav om innsyn i konti ikke har vært gjenstand for rettslig behandling”

3.1.4 The Appeals Selection Committee of the Supreme Court judgment of 6 February 1997

Gulating High Court judgment of 3 December 1996 was appealed to the Selections Committee of the Supreme Court. In the appeal it was pointed out that the Gulating High Court judgment was rendered before the Walstons received and opposed the Banks pleading of 9 October 1996. Furthermore, the Walston pointed out the procedural errors prevented the material part from being treated; whether the Walstons were in default, from when, how much.⁶⁹

The case, according to the Appeal Selections Committee of the Supreme Court, was lack of examine the case documents before judgment was made. However, on page , it stats that Gulating High Court judgment is appealed in its entirety because of the Court procedural errors by Not letting the Walstons oppose the banks pleading of 9. October 1996. In their decision of 6 February 1997, the Appeals Selection Committee of the Supreme Court of 6. February 1997, first establish that it had the full competence to try the High Court procedural treatment in the case in ref. to The Civil Procedure Act § 402 first section No. 2. The Appeals Selection Committee of the Supreme Court went on to recap Gulating High Court reason for not sending the Walstons a copy of the banks letter of 9.October 1996. The Appeals Selection Committee of the Supreme Court based the decision on Gulating High Court letter of 10 December 1996 which stated that the banks pleading of 9 October 1996 did not contain any new information central to the case. The Appeals Selection Committee of the Supreme Court then went on to discuss whether the content in the banks pleading could have affected the outcome of the case.

⁶⁹ The Appeals Selection Committee of the Supreme Court judgment of 6 February 1997, case No. LNo. 45K/1997, 28/1997

The Appeals Selection Committee of the Supreme Court ignored what flowed from the banks pleading which was crucial to the case and which would have consequences for the outcome of then case, namely:

- a) That the Judge in his judgment of 20.12.1995 stated that up to this time was of the opinion that the Walstons had full trust in him. The banks remark that the Judge was fully aware of the Walstons mistrust to the Judge since 1992 leaves the question whether the Judge was truthful or not in his judgment of 20.12.1996. It also raises the question; why the Judge did not take up his competence question before 20.12.95? When he was aware of the Walstons mistrust in him and his office.
- b) That, by the court actions, the suitability question whether the Judge was subjective or objective suitable according to the Courts Act § 108 was never treated. The High Court treated only the Judges employment with DnB.
- c) That the bank was not able to document the alleged debt against the Walstons.
- d) The material part of the case was never treated in this foreclosure complex

That these crucial central issues in what was a foreclosure request case was left out of the Appeals Selection Committee of the Supreme Court discussion leaves serious questions regarding fair trial and the arbitrary treatment of this case. The Enforcement and execution laws demand are strictly regulated and are absolute because of the potential harm to the parties. The conditions the law demands must be fulfilled.⁷⁰ The material condition must be fulfilled such as the conditions in Enforcement and execution Act § 4-1 been fulfilled. Surprisingly the Appeals Selection Committee of the Supreme Court just as the lower

⁷⁰ Foremost the claim that is requested enforced must be overdue and default must be occurred (4-4 first segment. Norwegian text: (Førts og fremt må det krav som begjæres tvangsfullbyrdet, være forfalt, og misligholdt må være inntrådt (§ 4-4 første ledd):

court, places its emphasis on the declaratory judgment of 22.04.94 binding of 8.3.97 as though it was an enforcement judgment. Then the court wrongfully says the appeal to the High Court was only about the lower court Judges competence. The courts actions in this case prevented the Walstons from having the alleged debt legally treated and the district court judge's statement that he was up to December 1995 of the opinion that the Walstons had trust in him since 1992 treated.

The Appeal Selection Committee of the Supreme Court concluded with that the High Court omission to give the Walstons a copy of the banks pleading of 9 October 1996 did Not constitute a procedural error according to The Civil Procedure Code Article 401 second segment. The Now Chief Justice of the Supreme court, Tore Schei's statement that" it should be a rule that pleadings should be sent the other party or their council" raises questions whether the Appeal Selection Committee is familiar with the Civil Procedure Code Article 135 which states that the parties in a case can request copy of the case documents. It is one of the pillars in the greater concept of a fair trial according to European Court art. 6 (1) to have "the opportunity for the parties to have knowledge of and comment on the observations in their judgment of 6. February 1997, the Appeals Selection Committee of the Supreme Court first establish that the court has full competence to try the High Court procedural treatment in the case in ref. to The Civil Procedure Code Article 402 first section No. 2. or evidence adduced by the other party." ⁷¹

It is to criticize the Appeals Selection Committee of the Supreme Court for stating that a declaratory judgment ("the lien is binding and can be used as a foundation for the execution" is enough to foreclose on the Walstons properties without treating the central issue if the Walstons at all were in default. The National Courts prevented the Walstons from opposing the material part of the case. The incorrect judgment of 6 February 1997⁷² became binding for the final judgment; confirmation of the foreclosure sale. The Court has

⁷¹ European Court judgement of 23 June 1993, Para. 63 in case: Ruiz- Mateos v. Spain.

⁷² Appeals Selection Committee of the Supreme Court judgment of 6 February 1997, case No.

LNo.45K/1997,28/1997

acted as though such a default has been proven and made its decision accordingly. The Walstons have demanded that DnB put forward this so-called proof of default, the bank has refused to honor their repeated request for the past 10 years.

3.1.5 The European Court judgment of 3 June 2003

Because of the procedural errors in the case, the Walstons brought a complaint to the European Court for breach on Convention Article 6 (1). The Walstons obtained a legal report from Professor Dr. Juris, Carl August Fleischer where he pointed out several breaches on the concept of a fair and neutral tribunal in the case.⁷³

For the facts of the case, the Court relayed mainly on the national court's judgment. The way I see it, the problem starts here with the Court relaying on the national judgment, which is incorrect. If the national judgment was correct, there would be No purpose for bringing the case to the European Court. According to the national courts the Walstons stopped paying the mortgages, resulting in an overdraft of NOK 4 million. But, as shown above, the national court never established nor treated any so called default. The Walstons forwarded prove to the national Courts that there was only one mortgage of NOK 2 300 000, 00 (buildings loan converted 31.12.89), Not mortgages as stated in the European Court's judgment. Futhermore they agued that there was not and never have been an overdraft of NOK 4 million. On the contrary, central evidence, the Banks letter of 3 December 1990 contained an admission that the Bank was in breach of the contract of 7 November 1989. This was the core of the complaint to the Gulating High Court; the Walstons were denied access to their case documents and thus prevented from opposing the Banks claim of a debt of NOK 6 million that the Bank could not document.

In their judgment of 3 June 2003, case No. 37372/97, the European Court established that there was a breach on the convention article 6 (1) and that the Walstons "had a legitimate interest in receiving a copy of the Bank's observation of 9 October 1996". According to the

⁷³ Professor Dr. Juris Carl August Fleischer report of 2 January 1997

Court the Walstons were placed at a disadvantage vis-à-vis the bank under the Gulating High Court's preceding.

Under paragraph 58 the European Court Notes that “ the Banks observation of 9 October 1996 were submitted in reply to those made by the applicant's lawyer on 23 September 1996 and related directly to the ground of the applicant's appeal, namely the alleged lack of impartiality of he District Court. Among other things they confirmed that the District Court judge had been aware of the objections raised by the applicants as to his participation since 1992. Accordingly, this had contradicted and disapproved his own statement in the District Court's decision of 25 June 1996 to the effect that, until their lawyer's plea of 12 December 1995, he had understood the applicants to accept him as a judge, see judgment of 21 December 1995”.⁷⁴

The European Court went on to address the other issue in the case by stating “Futhermore, responding to a query raised by the applicants lawyer on 23 September 1996, the banks submission of 9 October 1996 corrected information it had previously provided as to the size of the applicants debts”.

The European Court was “Not persuaded by the government's argument that any lack of fairness was remedied in the proceeding before the Appeals Selections Committee of the Supreme Court. The latter confined itself to a finding that the Gulating High Court's omission did not amount to a procedural error under the national law, on the ground that the Gulating High Court's assent, the observations contained no information of any importance for its decision”.⁷⁵

The European Court invoked Article 41 and awarded Non- pecuniary damage of 18 000 Euro. The Walstons claim for pecuniary damage was dismissed because the European

⁷⁴ The European Court judgment of 3 June 2003 in case No 37372/ 97, para.58 : Walston v. Norway

⁷⁵ European Court judgment of 3 June 2003 in case No 37372/ 97, para. 59 : Walston v. Norway

Court could not speculate as to what the outcome of the case would have been had Article 6 (1) not been breached.

3.1.6 Supreme Court Judgment of 19 November 2004

After receiving the European Court judgment of 3 June 2003, the Walstons set in motion two proceedings. The first action was a compensation claim against the State with the Ministry of Justice for the loss the breach had caused, namely the loss of home and workplace which the two properties represented. The claim was dismissed by Oslo Court on the grounds that the Civil Procedure Code Article 436⁷⁶ prevented a compensation claim to be raised as long as a binding judgment was not dismissed or changed.⁷⁷ Oslo Court concluded in their decision that the European Court judgment proves that the Walstons had received reparation for the error, an error that did not lead to dismissal or change of earlier decision.

The Walstons requested a reopening of the case to the Selection Committee of the Supreme Court. The request was denied the 19 November 2004 on the following grounds:

- The property in question was sold to others and confirmation of the bid was final.
- The Walstons had no longer legal interest in the case on the ground that the property was sold.
- Reopening after the Execution and Enforcement Code, Article 2-12 could not be granted
- The breach of Article 6 (1) had no effect on the Gulating High Court decision.

⁷⁶ Norwegian text of Civil Procedure Code Article 436: "Så lenge en rettslig avgjørelse ikke er opphevet eller forandret eller tjenestemannen ved dom er kjent skyldig i straffbart forhold ved avgjørelsen, kan erstatningssøksmål etter § 435 ikke reises i anledning av avgjørelsen. Andre søksmål etter § 435 kan ikke i Noe tilfelle reises i anledning av rettslige avgjørelser"

⁷⁷ Oslo Court judgment, case No. 03-010391, Walston v. State with Ministry of Justice

4 The Hammern case

4.1 Background for the Hammern case

Ulf Hammern was employed in Botngård kindergarten where he was accused of sexually abusing one or more of the children. On 22 September 1993, he was indicted under Norwegian Penal Code Article 195, 198 and 213 for allegedly sexually abusing 10 children. In the trial that took place at Forstating High Court, Hammern was acquitted by a judgment of 31 January 1994.⁷⁸ After his acquittal, the Hammern filed a suit to Frostating High Court petitioning full compensation after the Code of Criminal Procedure Article 444, cf. 445 and 446. In judgment of 28 February 1995, the Frostating High Court granted Ulf Hammern NOK 40 000, 00 for pain and suffering and NOK 125 000, 00 for non-pecuniary damage. Hammern request for supplementary compensation under Article 444 was rejected.⁷⁹

Ulf Hammern appealed the Frostating High Court to the Appeals Selection Committee of the Supreme Court with the request to quash the Frostating High Court judgment on the grounds that the Frostating High Court decision contained the assumption of guilt. This was a breach of presumption of innocence according to the European Court Article 6 §2.

The Appeal Selection Committee of the Supreme Court in their decision of 8 June 1995 rejected Hammern's appeal and confirmed the Frostating High Court's decision. The Appeal Selection Committee of the Supreme Court points out that Ulf Hammern was not liable under the criminal law but the evidence in a compensation case must follow the law under the compensating act. Seeing the case in its entirety, Appeal Selection Committee of the Supreme Court concluded that Hammern "has not shown it to be probable that he did not perform the acts which grounded the charge".⁸⁰

⁷⁸ Frostating High Court judgement of 31 January 1994

⁷⁹ Frostating High Court judgment of 28 February 1995

⁸⁰ Appeal Selection Committee of the Supreme Court judgment of 8 June 1995

Ulf Hammern brought his case to the European Court where it was admitted 11 September 2001 and Norway was found 11 February 2003 to be in breach of Article 6 (2).⁸¹

In the view of the European Court, the Appeal Selection Committee of the Supreme Court reasoning clearly amounted to a voicing of suspicion against Ulf Hammern for which he had been acquitted. Furthermore, it was pointed out that the evidence in the compensation case overlapped with what had been treated in the criminal trial judge by the same court, sitting in the same formation constituted a breach on the Article 6 (2),⁸² no compensation was awarded, because it was not requested.

In order to have his case redressed, Ulf Hammern filed a compensation suit against the State with the Ministry of Justice 12 December 2003. His case was dismissed first by the District Court 24 November 2004 and was confirmed by Frostating High Court 11 February 2004. The latter dismissal was confirmed by the Appeal Selection Committee of the Supreme Court 3 June 2005.⁸³

In their judgment of 3 June 2005, the Appeal Selection Committee of the Supreme Court reasoned the dismissal after the Civil Procedure Act, Article 436 ⁸⁴ c. Article 435. As long as a binding judgment is not dismissed or changed, a compensation claim cannot be raised.

⁸¹ The European court judgment of 11 February 2003 , case No. 30287/96 – Hammern v. Norway.

⁸² The European Court judgment , Hammern v. Norway , case No. 30287/97, para 45

⁸³ Appeal Selection Committee of the Supreme Court judgment of HR-2005-00898-U, CASE NO. 20005/504-Ulf Hammern v. the State with Ministry of Justice.

⁸⁴ See footnote 75

5 Effective remedy at the National Court

5.1 Right to an effective remedy, European Court Article 13

The right to access to an effective remedy is guaranteed under Article 13. For one or another reason Article 13, its written clarity notwithstanding, has been shrouded in mystery. Jacobs and White describe in their book about the Convention, that Article 13 “occupied something of a twilight zone in the case law of the convention organs”.⁸⁵ Others, like P. van Dijk and G.J.H van Hoof in their book have much of the same view and call the status of Article 13 in the Convention as an odd one.⁸⁶

Each article in the Convention is autonomous and stands alone, but there are also general provisions which affect all the rights in the convention and the additional protocols. “Some of these operate to limit the substantive rights, others to expand them”.⁸⁷

Article 13, original text.

“Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity”.

⁸⁵ Jacobs and White-The European Convention on Human Rights, Fourth Edition page 459 chapters 5. See R White, remedies in a Multi- Level Order: The Strasbourg Court and the UK in C.Kilpatrick, T.And Novitz, and P. Skidmore, (eds), The Future Remedies in Europe (Oxford, 2000)

⁸⁶ P. van Dijk and G.J.H van Hoof in collaborations with A.w.Heringa, J.G.C. Schokkenbroek, B.P.Vermeulen,M.L.W.M. Viering, L.F.Zwaak : Theory and practice of the European Convention on Human Rights

⁸⁷ Iain Cameron- an Introduction to the European Convention on Human Rights, 4th edition, page 126, 2 paragraphs

The literal interpretation of this article is, when an individual's rights and freedoms are violated; he shall have redress by a national authority even though the violation was committed by an official of that nation.

The European Court has in the Malone case of 1984 stated that "Article 13 constitutes one of the most obscure clauses in the Convention and its applications raises extremely complicated problems of interpretation. This is probably the reason why, for approximately two decades, the Convention institutions avoided analyzing this provision, for the most part advancing barely convincing reasons".⁸⁸

The reason for the difficulty lays in the very nature of the Article. For many years Article 13 was treated by the European Court as supplementary and taken in conjunction with other articles. The European Court's interpreted Article 13 to come into effect where it was a breach of another article.

In recent years this has changed, it is now established through the European Court practice case law that Article 13 can stand alone. This principle was first forwarded in the *Class* case from 1978; it took another 18 years to solidify this principle in the case law in 1996 in *Valsamis* case.⁸⁹ In *Kudla* case in 1996,⁹⁰ the European Court found a lengthy proceeding of a case was a breach on Article 13. In this case The Grand Chamber made the following definition of Article 13: "The object of Article 13 as emerges from the *travaux preparatoires*, is to provide a means where by individuals can obtain relief at national level for violation of their convention rights before having to set in motion the international machinery of complaint before the court".⁹¹

⁸⁸ European Court judgement of 2 August 1994, p. 41 – *Malone v UK*, case No 8691/79

⁸⁹ European Court *Valsamis v. Greece*, 18 December 1996, case NO 21787/93

⁹⁰ European Court *Kudla v. Poland*, case No. 30210/96

⁹¹ European Court *Kudla v Poland* (App.30210/96) Grand Chamber definition of Art. 13, para.152 of the judgment

The autonomous interpretation of Article 13 will give the aggrieved party a right to have an effective remedy before the national authorities which will put the aggrieved party back in the same position he was before the breach, *restitutio in integrum*. Having the case redressed at the national level, will fulfill the sovereignty issue for the High Contracting party as well as the obligation under Article 13.

5.2 Council of Europe Committee of Ministers Recommendation No R (2000) 2

The Committee of Ministers adopted on 19 January 2000, under the terms of Article 15 b of the Statute of the Council of Europe, a recommendation to the Contracting Parties on the re-opening or re-examination of certain cases in the national courts.⁹² In their recommendation, the Committee of Ministers restates first the aim of the Council of Europe is to bring unity between its members. As far as I can see, this phrase has been left out in NOU under point 15.5.2.

Norway followed up this request in the government review of the Civil Procedure Code, NOU 2001:32, chapter 15. First, in their treatment of the recommendation, the national committee recaps the Committee of Ministers points; reminding the parties of their commitment they have accepted under Article 46, to abide by the final judgment of the European Court in which they are party to. It is pointed out that this can imply a duty to try other means than compensation which ensures the damage caused by the violation restores the injured party, as far as possible and is put in the same position as before the violation. Furthermore, it is up to the National courts to decide what means is best suited to achieve restoration within the framework of their systems. However, it is pointed out that the Committee of Ministers experience with their supervising the execution of the European

⁹² Council of Europe recommendation No. R (2000)2 of the Committee of Minister, adopted 19 January 2000.

Court's judgments shows that reopening of a case has proved to be the most effective method.⁹³

The State's obligation can also "entail the adoption of measures, other than just satisfaction awarded by the Court in according with Article 41 of the Convention and/ or general measures, which ensure that the injured party is put, as far as possible, in the same situation as he or she enjoyed prior to the violation of the Convention (restitution in integrum)."⁹⁴

The Civil Procedure Act review committee, NOU 2001 : 32, acknowledges the need for access for reopening of cases containing procedural errors, which the Th Civil Procedure Act § 407 No. 7 b permits. This is in line with the Council of Europe Ministers Committee R (2000). In reference to the recommendations there should be access for reopening of cases if the breach consists of a substantial procedural error that gives rise to serious doubt regarding the outcome of the case.⁹⁵

⁹³ NOU 2001:32, Volume A, Chapter 15, under 15.5.2 (Norwegian text): "Medlemslandene oppfordres på denne bakgrunn til å gjennomgå sine nasjonale rettssystemer med sikte på å sørge for at der er tilstrekkelig muligheter for gjenopptagelse av en sak i tilfeller hvor EMD har konstatert at en krenkelse har funnet sted"

⁹⁴ NOU 2001:32, Volum A, p. 15.5.2 (Norwegian text): "Det påpekes at dette kan innebære plikt til å ta i bruk andre virkemiddel enn erstatning som sikrer at krenkelsen gjeNopprettes ved at den krenkende part så vidt so mulig stilles i samme posisjon som før krenkelsen"

⁹⁵ NOU 2001:32, Volum A, 15.6.4.9.2 (Norwegian text) "I henhold til rekommandasjonen bør det være adgang til gjenåpning dersom krenkelsen består i en så vesentlig saksbehandlingsfeil at det gir opphav til alvorlig tvil med hensyn til utfallet av saken"

6 Conclusions and Recommendation

6.1 Request for reopening and compensation denied

In both cases the European Court found Norway in breach of Article 6, right to a fair and neutral tribunal. This principal is the main pillar of a democratic society. Article 6 is the most important Human Rights article that is guaranteed in the Convention, without it, the other articles become all but meaningless and justice becomes theoretical and illusory, without article 6 protections and enforcement.

Bearing in mind the Convention Article 13 and the Council of Europe Ministers Committee recommendation R (2000)2 to the High Contraction Parties to ensure that access is available for certain cases following judgments of the European Court where a breech has been found and according to the Conventions Article 13, the Walstons and Hammern case should be retried or compensated. In order to fulfill the condition of *restituto in integrum* the Walstons and Hammern had a right to an effective remedy before a national authority after the convention was violated, both had an interest to have their case reopened so the damage caused by the procedural errors could be repaired. As I have pointed out before in chapter 3 and 4, neither case was fully compensated. I will show several procedural errors done in both cases which could have an effect on the outcome of both cases.

6.2 Changed the character of the case

In both cases, the Appeal Selections Committee of the Supreme Court changed the character of the case.

In the Walston⁹⁶ case Lnr45K/1997(28/1997, the Appeal Selections Committee of the Supreme Court by treating it as an ordinary reopening case and not a reopening as a result of a Convention breach, by doing so, the case meaning was altered. In their reopening request, the Walstons stated clearly that the reopening was requested after the Civil Procedure Code of 1915, Article 407 (6 and 7) and the European Court Article 13. In their judgment of 19 November 2004 the Appeal Selection Committee changed this to:” The subject matter is a request for reopening of a judgment made by the Appeals Selection Committee of the Supreme Court, regarding foreclosure sale of real property. By doing so, the Appeal Selection Committee avoided to treat the breach of the Convention Article and what flowed from this breach. Had this been done the Walston would have the material part of the case treated: if the Walstons were in default (See chapter 3). Instead of treating the consequences for the breach, The Appeal Selections Committee referred to several decisions where the Execution and Enforcement Code Article 2-12 is understood such that a confirmation of a bid cannot be reopened, and dismissed the case.

When the Appeal Selection Committee concluded in their judgment that the bid on the property was final and the new owner must be protected, this should open up for compensating for the Walstons. By changing the character of the case, the court went outside of the applicants request and denied them entry into the Court by using a wrongful premise, in order to make the case appear to be something else. This is a breach on the Civil Proceeding Code, Article 85 and Article 6 No1 right to a fair trial.

In the Hammeren case, the Appeal Selections Committee of the Supreme Court used the same tactic:” The case concerns dismissal of a suit “, with no reference to Hammeren’s clear request for compensation of a Convention breach of Article 6 No2.⁹⁷

⁹⁶ The Appeal Selection Committee judgment of 19 November 2004, case No HR-2004-01931-U(2004/408)

⁹⁷ The Appeal Selection Committee of the Supreme Court judgment , case No HR-2005-00898-U,(2005-504)

By the Appeal Selection Committee of the Supreme Court changing the character of the cases, denied the Walstons and Hammern the right to be heard and an effective remedy as guarantee under Article 6 no1 and Article 13.

6.3 Retrial by the same court that caused the breaches

Both cases had to request reopening/ compensation from the same court that previously had denied them a fair trial. In Norway there is no separate organ to deal with incorrect judgments brought back to Norway after the European Court has established a Convention breach. By so doing, the Appeal Selection Committee judges on their own judgments.

In the Walston case, what is inherently unfair is the judges in the case sit in absolute power positions. One of the judges in the Appeal Selection Committee of the Supreme Court judgment of 6 February 1997 is now the Chief Justice of the Supreme Court, and the First presiding judge in Gulating High Court judgment of 3 December 1996 is now a Supreme Court judge. Both courts denied the Walstons access to the court and now both judges sit together on the Supreme Court.

Furthermore, the Walstons were denied access to the Supreme Court Judges opinion after the European Court judgment was made. In accordance with the national civil law Article 413 No. 2 and Article 415, the Appeal selection Committee of the Supreme Court makes their decision after a statement is given by one of the three judges who judged in the case. The judge, who was asked to make such a statement, said that he found no grounds to give any statement regarding the reopening case. The Judges silence on this matter spoke volumes and prevented the Walstons from opposing the underlying meaning of his silence. This is a breach on the *equality principle* and placed the applicants at a *disadvantage vis-à-vis* the Supreme Court; the Supreme Court had the field to them selves judging their own judgment.⁹⁸ It is a legal maxim that justice must not only be done, it must be seen to be done.

⁹⁸ The Appeals Selection Committee of the Supreme Court letter of 12 October 2004

6.4 Denial of legal aid

The High Contracting Parties have pledged to uphold and secure and respect the rights and freedoms defined under the Convention.⁹⁹ The burden to take a case to the European Court can be heavy, procedural errors can hurt the individual equally as hard as the judgment itself which contents is in breach of his Human Rights.

After the Walstons requested a reopening to the Appeal Selection Committee of the Supreme Court and the Ministry of Justice made it unnecessarily hard on the Walstons by denying them legal aid. Denial of legal aid placed the Walstons at a disadvantage Vis a Vis their opponent. The refusal was based on the grounds that the request for reopening the case was not of principal interest.¹⁰⁰

However, one can ask what can be of more principle interest than a fair trial? The Ministry of Justice in its refusal letter shows little respect and understanding of the principle of adversarial hearing and equality of arms, and the controlling role the European Court has. The European Court shall control to see the National courts respect and secure fundamental Human Rights. The European Court is not a fourth instance, after a breach of the convention is established, it is the national courts privilege to rectify and repair the damage the breach caused, after national laws.

Hammern did received legal aid for his case the Walstons were denied legal aid. This proves the granting of legal aid is arbitrary and caprices.

⁹⁹ The European Human Rights Convention Article 1

¹⁰⁰ Letter of 30 August 2004 from the Ministry of Justice

6.5 The European Court usurping National Sovereignty.

The High Contracting Parties, by allowing the European Court to usurp some of their national sovereignty in exchange for letting cases be tried in the European Court where there is little or no compensation made to the aggrieved parties, raises serious issues. This makes the European Court a 4th instance with the tacit acceptance of the High Contracting parties.

As we have seen in Chapter 3, the European Court invoking the mantra that the Walstons opponent's letter of 9 October 1996 had no causal effect; was in itself a speculation resulting in a defacto judgment made through a cloudy crystal ball. Causal effect can only be determined through a retrial that is beyond the scope, competence and mandate of the European Court.

1. When the European Court says there is or is not a causal effect under Article 41; is in itself a speculation, this speculation raises legal competency issues for the European Court.
2. When the causal effect is used selectively, it raises the issue of legal certainty.

By saying there is or is not a causal effect is a speculation as to the outcome of the case. In the Walston case the European Court said it could not speculate as to whether the document that was not communicated to the Walstons containing the statement that the amount of the debt was higher or lower had no effect on the outcome of the case. The Bank offered no explanation or documentation as to whether the Walstons were in default or not, this so-called debt was the core of the case. The European Court ruled on the importance of the letter to the material part of the case. By doing so the European Court overstepped its mandate and caused a continuation and lengthening of the breach because of what flowed from this document that was the subject of the letter that the court found that Norway was in breach of the adversarial principle. In this light, the European Court became a dynamic 4th instance because it ruled on the causal effect of one letter in the case complex out of context with the rest of the voluminous evidence. This was against its own dictum that "it cannot speculate as to the outcome of the case had the letter been communicated to the

Walstons”. This effectively preventing the Walstons from having what flowed from the breach repaired.

Under the principle of equality of arms, as one of the features of the wider concept of fair trial, each party must be afforded a reasonable opportunity to present his case under conditions that do not place him at a disadvantage vis-à-vis his opponent. (Dombo Beheer B.V. v the Netherlands judgment of 27 October 1993, Series A No. 274, p. 19, § 33). In this context, importance is attached to appearances as well as to increased sensitivity to the fair administration of justice (Bulut v. Austria judgment of 22 February 1996, *Reports of Judgments and decisions* 1996-II, p 356, Article 47).

The European Court has been criticized in the courts case-law for its use of Article 41. In the Kingsley v UK case, three judges dissented; Judge Casadevall was joined by Judge Bonello and Judge Kovler. In their dissenting opinion, they address that the “applicants are entitle to something more than a mere moral victory

Liberty, a non government organization, and a third party in the Kingsley case stated their view in cases where the Court uses the mantra that it is impossible to speculate what the outcome of the case would have been had the Convention Article not been violated. The organization is of the opinion that in cases where violations are present, these cases should be retried.

The European Court is not a 4th instance and cannot usurp the sovereignty of the National Court and does not have the competence to make decisions on the material part of the case, in essence, retry the case; substituting its opinion in place of the national court.

6.6 Surrendering National sovereignty

Bearing in mind the legislators will and intent forwarded in the Civil Procedure Code.

According to Article 407 (a) and (b) reopening can be claimed:

- When the procedural treatment of the case the judgment is founded upon, is in breach of international law.
- If there is a reason that the procedural errors had an effect on the outcome of the case
- Reopening is necessary to correct an incorrect judgment

In the Walston case, the State Attorney, requested dismissal on the ground that Civil Procedure Code Article 436 would effectively prevent such a suit. Article 436 states that a reopening cannot be request unless the impugned judgment is either changed or dismissed. The State could not see that the Article 13 (see chapter 4) could not lead to any wider access than the Civil Procedure Code Article 436. Article 13, could not in the States view, lead to any access to take out a suit that a judgment was in breach with the Convention , the same must be for compensations cases. Furthermore, the State points to that the European Court has competence to invoke Article 41 for pecuniary and non-pecuniary compensation. On this reason there would be no need to open up for reopening suit in cases like the Walstons. The State concludes that there is no causal connection between the procedural error and the loss Walston suffer by the breach.¹⁰¹ That there is a casual effect, there is no doubt, see chapter 3.

In the Hammern case, the same State Attorney, maintained that the Civil Procedure Code Article 436 is a ground for dismissal of the case, as he did in the Walston case. In the Hammern case, however, the State admits that if there isn't satisfactory reparation received from the European Court, the adequate way would be to request a reopening after the Civil Procedure Code 407 No7, as the Walstons did, with negative result. However, the State

¹⁰¹ The State Attorney pleading of 20.02.04, dok. 16, Walston v. Ministry of Justice, case No 03-010391.

saw this question as theoretical because Hammern did not request a reopening. The Appeals Selection Committee of the Supreme Court supported the State Attorneys view and found it unnecessary to treat this question.

The Appeals Selection Committee of the Supreme Court dismissed both cases on the grounds of Civil Procedure Code Article 436 that states no compensation or reopening can be granted as long as the impugned judgment is standing.

The State Attorney's statement contradicts the legislators will and intention. The legislators have decided that cases where a breach on the States international obligations have been found, should be given access to reopening the case, see Ot. prp.No. 70 2000 -2001 and Civil Code para. 404 No 7. The breach on legislators will and intent leaves the aggrieved parties without restituto in integrum.

It appears, cheaper for the High Contracting parties to have cases where breaches on the Convention Articles and Protocols have been found, to let the European Court become a defacto 4th instance, invoking the mantra and paying out minimal compensation or quite often none at all; by saying winning in the court is reward in itself and for the privilege of enriching the case law.

According to the Constitution Article 88, the Supreme Court judges as the last instance. If this willingness to give up part of the national sovereignty is being done for process economic reasons, this can easily become a boomerang for the High Contracting Parties as well as for the European Court of Human Rights. A high ranking public servant in the Ministry of Justice, wrote in the Norwegian law journal *Lov og Rett*, in discussing this problem stated; "The cost and inconvenience to reorganize the law can be far greater than the cost paid out in compensation ".¹⁰² The Convention has been enjoying great trust from the public, if the European Court continues its usurpation of National sovereignty with the blessing of the High Contracting parties through Article 41, this trust will be jeopardized.

¹⁰² Norwegian text: *Lov og rett* 10/ 2003.

The above begs the question, what cases would the National Court repair if the Walston and Hammern cases don't qualify for full reparations

The thesis proves there is no economic advantage to trade sovereignty for what appears to be a short term economic advantage, because these two cases alone have been going on in the Court system in one way or other for approximately 17 years with no end in sight.

6.7 Solution to the problem

- All High Contracting Parties should adopt the recommendation of 2000 from the Council of Europe and establish a review board for cases where the European Court has found a convention breach.
- Let these fundamental principal guaranteed in the Convention be well known through legal literature, courses and practice
- Legal aid must to be granted in these type of cases

If these principal are adopted and upheld, Norway will not only be a democratic state but a human right state, as earlier Chief Justice of the Norwegian Supreme Court Carsten Smith envisioned. Therefore, the injustice of the Walston and Hammern cases will be a thing of the past.

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